

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of)
)
Communications TeleSystems) File No. I-T-C-95-444
International)
)
Application for Authority)
pursuant to Section 214 of the)
Communications Act of 1934, as)
amended, to operate as an)
international private line carrier)

MEMORANDUM OPINION, ORDER AND CERTIFICATION

Adopted: December 17, 1996

Released: December 31, 1996

By the Chief, International Bureau:

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I. INTRODUCTION

1. With this order, we increase competition in international telecommunications markets by granting Communications TeleSystems International (CTS) authority to resell private lines for the provision of switched services between the United States and New Zealand. In doing so, we conclude that New Zealand offers U.S. carriers opportunities to resell private lines to provide switched services which are equivalent to those offered in the United States. In a companion order adopted today, we find also that New Zealand satisfies the effective competitive opportunities ("ECO") test for facilities-based entry by Telecom New Zealand Limited ("TNZL").¹

II. BACKGROUND

2. CTS is an authorized U.S. international facilities-based and resale carrier.² CTS certifies that it is not affiliated with any foreign carrier in New Zealand.³ CTS seeks authorization, pursuant to Section 214 of the Communications Act of 1934, as amended⁴ to resell international private lines ("IPLs") that are connected to the public switched network ("PSN") at both the U.S. and New Zealand end, or at one end, for the provision of switched services on the U.S.-New Zealand route.⁵ As required by the Commission's rules, CTS submits information and documentation to demonstrate that New Zealand offers U.S.-based carriers equivalent resale opportunities in New Zealand.⁶

¹ See Telecom New Zealand International Limited Application for Section 214 Authority to Acquire and Operate Facilities to Provide International Services between the United States and New Zealand, I-T-C-96-097, DA 96-2182 (rel. Dec. 31, 1996) ("TNZL File No. I-T-C-96-097").

² CTS Application for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to operate as an international private line carrier, File No. I-T-C-95-444, at 2 ("CTS Application").

³ CTS Application at 2-3, 14. CTS states that it has a foreign carrier affiliation with WorldxChange Ltd ("WorldxChange"), a registered international operator in New Zealand. See Letter from Robert E. Conn, Attorney for CTS, to William F. Caton, Acting Secretary, FCC (Nov. 7, 1995).

⁴ 47 U.S.C. § 214 (1995).

⁵ CTS Application at 1.

⁶ 47 C.F.R. § 63.18(e)(3). See Market Entry and Regulation of Foreign-affiliated Entities, Report and Order, 11 FCC Rcd 3873 at ¶¶ 133-138 and App. B (1995) ("*Foreign Carrier Entry Order*"), *recon. pending*.

3. We placed CTS's application on public notice on July 28, 1995.⁷ AT&T filed a petition to deny.⁸ CTS filed an opposition to AT&T's petition to deny⁹ and AT&T replied.¹⁰ Because the issues raised by CTS's application are substantially similar to those raised by TNZL's facilities-based application, we incorporate by reference the record in that proceeding. AT&T, MCI and Sprint filed petitions to deny TNZL's application.

4. In the *International Resale Order*, the Commission found that encouraging the resale of international telecommunications services would further the dual public interest in cost-based prices for international telecommunications services and more efficient use of international facilities.¹¹ Specifically, the Commission concluded that promoting the resale of IPLs to provide switched services would foster new entry into the international telecommunications market and exert downward pressure on above-cost international accounting rates and foreign collection rates through the diversion of switched traffic to resold private lines.¹²

5. The Commission further concluded, however, that permitting "one-way" resale, *i.e.*, resale only from the overseas point inbound to the United States, would undermine the benefits of IPL resale. The Commission recognized that "one-way" resale could enable foreign carriers unilaterally to divert U.S. inbound switched traffic to private lines, for which U.S. carriers normally receive settlements payments under our International Settlements Policy,¹³ thereby evading the settlements process for that traffic.

⁷ Pub. Not. Rep. No. I-8079 (July 28, 1995).

⁸ AT&T Petition to Deny (filed Aug. 28, 1995).

⁹ CTS Opposition to AT&T Petition to Deny (filed Sept. 11, 1995).

¹⁰ AT&T Reply to CTS Opposition (filed Sept. 21, 1995).

¹¹ Regulation of International Accounting Rates, Phase II, *First Report and Order*, 7 FCC Rcd 559 (1992) (*International Resale Order*); see also Regulation of International Accounting Rates, Phase II, *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *Third Report and Order and Order on Reconsideration*, FCC 96-160 (rel. May 20, 1996).

¹² The term "accounting rate" refers to a rate negotiated between two correspondent carriers on a particular international route which is intended to allow each carrier to recover the costs of the facilities provided for originating and terminating an international telex, telegraph or telephone call. Most operating agreements provide for the two carriers to split the accounting rate 50/50. The term "collection rates" refers to tariffed rates charged by carriers to customers, or end users.

¹³ See *International Resale Order*, 7 FCC Rcd at 561. The International Settlements Policy requires: (1) the equal division of accounting rates; (2) nondiscriminatory treatment of U.S. carriers; and (3) proportionate return of inbound traffic. See Policy Statement on International Accounting Rate Reform, 11 FCC Rcd 3146 at ¶ 11 (1996).

6. Permitting the unilateral evasion of the settlements process would not only exacerbate the U.S. net settlements deficit, it would also fail to exert downward pressure on international accounting rates, frustrating the Commission's IPL resale policy goals. Accordingly, the Commission concluded that it would authorize the resale of IPLs interconnected to the PSN only to countries that allow such resale to occur in both directions. The Commission required each applicant seeking to resell U.S. IPLs for the provision of switched services to demonstrate that the destination foreign country affords resale opportunities equivalent to those available under U.S. law.¹⁴

7. In the *Foreign Carrier Entry Order*, the Commission amended the rules adopted in the *International Resale Order*. It restated the equivalency criteria in the same manner as its effective competitive opportunities ("ECO") criteria, which govern entry by foreign carriers that control foreign bottleneck facilities.¹⁵ The Commission's rules thus require that applicants seeking to provide switched service over resold private lines demonstrate that the foreign country at the other end of the private line provides U.S. carriers with: (1) the legal right to resell IPLs, interconnected at both ends, for the provision of switched services; (2) reasonable and nondiscriminatory charges, terms and conditions for interconnection to foreign carrier domestic facilities for termination and origination of international services, with adequate means of enforcement; (3) competitive safeguards to protect against anticompetitive and discriminatory practices affecting private line resale; and (4) fair and transparent regulatory procedures, including separation between the regulator and the operator of international facilities-based services. These four principles must be satisfied at the time we make an equivalency determination.¹⁶ Additionally, we examine other public interest factors that may warrant grant or denial of the application.¹⁷

¹⁴ To date, the Commission has found that Canada, the United Kingdom and Sweden offer U.S.-based carriers equivalent opportunities for the resale of IPLs for the provision of switched services. See *Motorola/EMI*, 7 FCC Rcd 7312 (1992), *on recon.*, 9 FCC Rcd 4066 (1994); *ACC Global/Alanna*, 9 FCC Rcd 6240 (1994); *Cable & Wireless Inc., et al.*, 11 FCC Rcd 1766 (1996). Applications for equivalency determinations for Australia, Denmark, Hong Kong, Chile, Mexico and Finland are pending.

¹⁵ *Foreign Carrier Entry Order* at ¶¶ 133-138. In changing this rule, the Commission noted that its restatement of the equivalency criteria did not represent a substantive change. The Commission stated that a "finding of equivalent resale opportunities" is a finding of "effective competitive opportunities" to resell IPLs for the provision of switched services. *Id.* at ¶ 137.

¹⁶ *Id.* at ¶ 138. This is in contrast to the ECO standard, which permits these four principles to be satisfied in the "near future."

¹⁷ *Id.* at ¶ 136.

III. DISCUSSION

A. ECO Analysis

1. Resale Entry

8. The first factor examined to determine if there are equivalent resale opportunities for U.S.-based IPL carriers in New Zealand is whether they have the legal right to resell IPLs, interconnected to the PSN at both ends, for the provision of switched services.¹⁸

9. Operators seeking to interconnect IPLs to the PSN at one end or both the New Zealand and foreign end are required to register with the Communications Division of the Ministry of Commerce ("Ministry").¹⁹ CTS states that applicants register to provide these services by submitting a brief letter and a \$1000 (NZ) application filing fee. CTS indicates that an additional \$10,000 (N.Z.) fee is due upon registration and each year thereafter.²⁰

10. According to CTS, the Ministry will grant registration to prospective IPL resellers when the country to which the prospective reseller seeks to provide service has regulatory conditions "broadly equivalent" to those in New Zealand.²¹ In assessing whether a country is "broadly equivalent," the Ministry will consider: the conditions, including interconnection conditions, that the country places on resellers and the potential for harm

¹⁸ *Id.*

¹⁹ CTS Application at 5-6; Telefax from Scott Wilson, Advisor, International Communications Policy, Ministry of Commerce, New Zealand to Helene Schrier Nankin, Attorney, FCC (Dec. 13, 1996). *See also* CTS Application at Exhibit B, Telecommunications (International Services) Regulations 1994 at §§ 3(a), 5(1) ("Telecommunications International Regulations 1994"); Compliance Statement: Telecommunications (International Services) Regulations 1994 at 3, 7 ("Compliance Statement"); Ministry Letter from Cristine Stevenson, Senior Advisor, Ministry of Commerce, New Zealand to Helene Schrier, Attorney, International Bureau, FCC at 1 (May 9, 1996) ("Ministry Letter"). The registration letter should: (1) describe the reseller, current and proposed services to be offered; and (2) list proposed and existing traffic routes and agreements with non-New Zealand operators. IPLs are referred to in New Zealand as "leased circuits." The record indicates that no registration is necessary for New Zealand or overseas-based applicants that seek to provide international leased circuits that are not interconnected to the PSN at either end. Telefax from Scott Wilson, Advisor, International Communications Policy, Ministry of Commerce, New Zealand to Helene Schrier Nankin, Attorney, International Bureau, FCC (Dec. 13, 1996).

²⁰ According to CTS, the \$1,000 (NZ) filing fee is equivalent to the \$705 (U.S.) Section 214 fee, given the currency exchange rate. CTS Application at 5 n.3. We note that at the current exchange rate of one New Zealand dollar to \$.7116 (U.S.), \$1000 (NZ) is equivalent to \$711.6 (U.S.). *See* TNZL I-T-C-96-097, *ex parte* letter (filed Nov. 21, 1996).

²¹ CTS Application at 6 (*citing* Compliance Statement at 3). CTS also explains that the Ministry attempts to answer applications within six weeks. CTS Application at 5 (*citing* Compliance Statement at 4).

from the reseller terminating traffic in New Zealand.²² Although New Zealand does not formally designate countries as "equivalent," the Ministry states that it will consider favorably applications to provide leased circuit services interconnected to the PSN at both the New Zealand and the U.S. end and a U.S. company could expect to be registered.²³ To date, no operators have requested registration to interconnect IPLs to the PSN at both ends.²⁴

11. Registration requirements are the same for foreign-based and New Zealand applicants, and there are no foreign ownership restrictions. The one exception is that no single foreign investor may own more than 49.9 percent of Telecom Corporation of New Zealand Ltd. ("TCNZ"), which the Ministry recognizes as the dominant telecommunications provider in New Zealand.²⁵

12. AT&T does not dispute the legal right to provide interconnected IPL services in New Zealand. Because no operators have requested registration to interconnect IPLs to the PSN at both ends, there is no concrete evidence that New Zealand will grant U.S.-based applicants registration to resell IPLs for the provision of switched services. The record, however, does not reflect, and we have no reason to believe, that New Zealand will deny U.S. carrier applications for such services. Consequently, we conclude that New Zealand affords U.S.-based carriers the legal right to provide switched services via resold private lines interconnected to the PSN at both the U.S. and the New Zealand ends. Nevertheless, because U.S.-based carriers' actual ability to enter the resale market is a crucial part of our equivalency determination, we will promptly revisit this equivalency determination in the

²² CTS Application at 6 (*citing* Telecommunications International Regulations 1994 § 5).

²³ CTS Application at 6 (*citing* Compliance Statement at 3-4). *See also* Ministry Letter at 11.

²⁴ Telephone Conversation between Helene Schrier Nankin, Attorney, International Bureau, FCC and Scott Wilson, Advisor, International Communications Policy, Ministry of Commerce, New Zealand (Dec. 9, 1996). Section 7 of the Telecommunications International Regulations 1994 enables the Secretary to impose two conditions on any registered international operator on a case-by-case basis. The conditions appear to address, *inter alia*, concerns over "one-way" resale of private lines into New Zealand. The conditions are reserve powers, which have never been imposed, and which would be exercised only when there was a situation that could cause substantial harm to consumers of international services in New Zealand. Compliance Statement at 5-6; Ministry Letter at 13.

²⁵ CTS Application at 6; Ministry Letter at 1. TCNZ is authorized to provide international and domestic telecommunications services in New Zealand. Telecom New Zealand Limited (TNZL), a wholly-owned subsidiary of TCNZ, is the wireline telecommunications operating company for TCNZ. TCNZ negotiates the interconnection agreements for TNZL. Bell Atlantic Corporation and Ameritech Corporation own minority interests in TCNZ (24.82% each). According to the Ministry, the Government's "Kiwi Share" in TCNZ requires that no single foreign entity own more than 49.9 percent of the shareholding in TCNZ and Government permission is required for any single foreign shareholder to own more than 10 percent of TCNZ. The Government has not rejected any foreign investment of greater than 10 percent in TCNZ, and it is possible for TCNZ to be 100 percent foreign-owned as long as foreign-owned shares in excess of 49.9 percent are held by more than one owner. Ministry Letter at 14. *See infra* note 66.

event the Ministry denies U.S.-based applications for interconnected private line resale.

2. Interconnection

13. The second factor examined to determine whether there are equivalent resale opportunities in New Zealand is whether there are reasonable and nondiscriminatory charges, terms and conditions for interconnection to a foreign carrier's domestic facilities for the termination and origination of international services in New Zealand.²⁶ In addition, there must be adequate means to monitor and enforce these conditions (e.g., published charges). We also consider relevant the availability of reasonable and nondiscriminatory arrangements for the underlying IPLs needed by U.S.-based resellers.

14. Parties did not comment on the reasonableness of the prices for the New Zealand half of an IPL. The record indicates that there are four carriers that offer IPLs on a facilities basis.²⁷ The record also indicates that TCNZ and TNZL are required to publish the prices, terms and conditions for certain prescribed services including private lines, pursuant to the Telecommunications (Disclosure) Regulations 1990. We have reviewed TNZL's international leased line tariff and note that there are no restrictions on reselling these lines. We also find that TNZL's rates for IPLs are not out of line with AT&T's rates for comparable half-circuits.²⁸

15. AT&T argues that New Zealand does not offer equivalent resale opportunities because it does not require standard, published, cost-justified interconnection agreements.²⁹ AT&T explains that resellers must negotiate interconnection arrangements privately with TCNZ, which presents opportunities for abuse and delay. AT&T notes that an interconnection dispute between TCNZ and Clear took four years to settle, primarily because of TCNZ's level of interconnection charges and its failure to offer technically equal trunk-side interconnection.³⁰

16. While the New Zealand interconnection regime may not be designed as we prefer, it appears at the present time that -- based on existing laws and regulations, the

²⁶ *Foreign Carrier Entry Order* at ¶ 49.

²⁷ Clear, TNZL, Sprint (NZ) and Telstra. *See* Ministry Letter at 12.

²⁸ *See* TNZL File No. I-T-C-96-097, TNZL *ex parte* letter at 2 & Attachments 1, 2 (filed Nov. 14, 1996).

²⁹ AT&T Petition to Deny at 2-4.

³⁰ *Id.* at 7; AT&T Reply to Opposition at 3. AT&T contends that resellers must incur additional costs to replicate the functions that would be available through trunk-side interconnection, such as identifying users of their networks and monitoring the connection and disconnection of calls. AT&T Petition to Deny at 7.

existence of multiple international facilities-based carriers (including one with 23 percent market share), and most importantly on favorable toll interconnection rates -- U.S. carriers have the opportunity to obtain interconnection on reasonable and nondiscriminatory terms for the provision of interconnected IPL resale. We are concerned that New Zealand does not have standard rates for toll interconnection accompanied by a pricing methodology that enables carriers seeking such interconnection to determine whether prices are cost-based. Other aspects of New Zealand's market performance, however, weigh in favor of finding that New Zealand satisfies this aspect of our equivalency test.

17. As an initial matter, we take this opportunity to review the basic legal and regulatory framework governing the telecommunications market in New Zealand. New Zealand relies primarily on the Commerce Act 1986 -- its general competition law -- to regulate telecommunications. In particular, Section 36 of the statute prohibits entities with a dominant position in a market from using their position to restrict or eliminate competition.³¹ However, New Zealand has issued some sector-specific legislation. The primary sector-specific statute is the Telecommunications Act 1987, which, along with subsequent amendments, liberalized the provision of telecommunications services, authorized the government to regulate international services and required TCNZ to disclose financial and interconnection information. The New Zealand government, in turn, has published several sets of regulations, the most important of which for purposes of our equivalency analysis are: (1) the Telecommunications (Disclosure) Regulations 1990 which requires TCNZ to disclose the full text of all interconnection agreements, certain financial information for itself and TNZL, and prices, terms and conditions for certain prescribed services including access to the public switched network, leased circuits and national and international toll services; and (2) the Telecommunications (International Services) Regulations 1994 which requires the registration of certain international service operators.³²

18. Interconnection arrangements in New Zealand are negotiated on a private contractual basis. However, several factors help protect against discriminatory conduct, including: (1) the legal requirement that TCNZ provide interconnection on terms that are not unreasonably discriminatory;³³ (2) public and private remedies for anticompetitive conduct,

³¹ Section 36 of the Commerce Act 1986 provides that "[n]o person who has a dominant position in a market shall use that position for the purpose of: (a) restricting the entry of any person into that or any other market, or; (b) preventing or deterring any person from engaging in competitive conduct in that or any other market, or; (c) eliminating any person from that or any other market."

³² Ministry Letter at 1-2, 10.

³³ See TNZL File No. I-T-C-96-097, TNZL *ex parte* letter at 4 (filed Nov. 14, 1996); TNZL Opposition at 12. The Ministry of Commerce confirms that "[TCNZ], as the dominant operator, is legally required to offer interconnection to other operators." Ministry Letter at 1. The Ministry also states that TCNZ must, and does, provide equal trunk-side interconnection and that a failure by TCNZ to provide interconnection, or the seeking of unreasonable or discriminatory terms (including unreasonable delays in negotiating an agreement) could provide grounds for legal action against TCNZ by a

and the apparent willingness of the New Zealand government to utilize such public remedies;³⁴ (3) the requirement that relevant prescribed services and all TCNZ interconnection agreements be published on a quarterly basis; and (4) emerging competition in the New Zealand local exchange market. TCNZ has reached interconnection agreements with Clear, Telstra (NZ) Ltd., Sprint Telecommunications (NZ) Ltd., CTS affiliate WorldxChange, and BellSouth NZ for international and domestic toll services, and presently competes with these carriers in both markets.³⁵

19. We believe that competition in the New Zealand telecommunications market would be better served if the government played a more direct role in overseeing interconnection arrangements. Indeed, while the relevant issue in this proceeding is the availability of interconnection for the provision of international services and not local exchange services, the protracted interconnection dispute between TCNZ and Clear for the provision of local service raises the serious concern that other competing carriers could encounter similar difficulties in negotiating toll interconnection arrangements. We also are concerned with the apparent lack of a transparent pricing methodology for TCNZ's toll interconnection arrangements.³⁶

20. We nevertheless observe that the growth of international and domestic service competition to TNZL and TCNZ provides some evidence that New Zealand today affords U.S.-based resellers the opportunity to obtain interconnection arrangements at rates that permit commercially viable operations, including access to necessary inter-city facilities and services. As noted above, TCNZ has concluded interconnection agreements with five carriers for international and domestic toll services, and presently competes with these carriers in both toll markets. TNZL has also submitted information from TCNZ's principal interconnection contract (with Clear), which establishes that rates for interconnection of all

negotiating party. *Id.* at 1-2, 9.

³⁴ The Ministry recently stated that "the Government would be very concerned to see a firm delaying negotiations, offering restricted terms and conditions or charging high access prices to its competitors for the purpose of restricting competition." Media Release, *Government Signals Future Directions for Regulation of Telecommunications, Electricity and Gas*, Office of the Minister of Commerce, New Zealand, dated June 26, 1996. The Ministry also indicated that: "Where [it] is not satisfied that both parties are negotiating in good faith, . . . the Government will take additional regulatory action such as initiating a Commerce Commission price control inquiry or, if circumstances warrant, directly imposing price control." *Id.* at 2. See also "Telecom, Clear settle - despite the politicians," *The Independent*, Sept. 8, 1995 (noting the efforts of New Zealand's Prime Minister and Communications Minister in assisting TCNZ and Clear to settle their local interconnection dispute).

³⁵ See TNZL File No. I-T-C- 96-097 *ex parte* presentation (dated Oct. 10, 1996) as clarified by Kevin McGilly, Director, Strategic Analysis, Freedom Technologies Incorporated, in a telephone conversation with Bob Calaff, Attorney, International Bureau, FCC (Dec. 13, 1996). Sprint NZ is now part of the Global One alliance in New Zealand.

³⁶ See *supra* ¶ 16.

toll traffic to TNZL's local network are approximately 2 cents (U.S.) peak, and 1 cent (U.S.) off-peak.³⁷ We also note that Sprint NZ's toll interconnection rate with TCNZ is approximately 2.5 cents (U.S.).³⁸ We further note that Clear may, without restriction, resell its toll interconnection arrangement with TCNZ and the discounted short-haul toll service that TCNZ provides to Clear. While MCI contends that TCNZ can offer interconnection at a price that Clear cannot match, Clear's ability to resell its toll access to TNZL's network has the beneficial effect of reducing TCNZ's ability to charge other carriers a higher rate for toll access than it charges Clear.

21. Most importantly, there is no indication in the record that the interconnection rates TCNZ provides Clear, Sprint NZ, or the rates offered to other international service competitors are precluding entry.³⁹ We note that TCNZ's toll interconnection rates compare favorably with rates in the United States for similar services.⁴⁰ Further, recent developments in New Zealand's telecommunications market suggest that New Zealand's interconnection regime is conducive to entry. In addition to Clear and Sprint, Telstra recently completed interconnection agreements with TCNZ (and also with Clear), and Telstra has initiated facilities-based service from New Zealand.⁴¹ Our finding that New Zealand satisfies the interconnection factor of our equivalency test is based in significant measure on the availability of favorable toll interconnection rates as well as the actual entry of multiple facilities-based international carriers into the New Zealand market, including one (Clear) which has achieved 23 percent market share.

22. Finally, we note that IPL resellers in New Zealand may, without restriction, interconnect their resold IPLs to the PSN in New Zealand by any lawful means, including through the use of business lines at standard, tariffed rates. IPL resellers that interconnect using business line services are free to do so on either an interim basis pending negotiation of an interconnection agreement (e.g., to obtain trunk-side interconnection) or on a permanent

³⁷ See TNZL File No. I-T-C-96-097 *ex parte* letter at 1 (filed Nov. 21, 1996). These local interconnection rates are identical for the origination and termination of domestic and international toll traffic. The TCNZ-Clear interconnection agreement also specifies a discounted short-haul toll rate for calls that originate or terminate in a local calling area outside one of Clear's points of interconnection to TNZL's local network. The discount is 30 percent off TNZL's applicable retail toll rates. *Id.* at 2.

³⁸ See Sprint Petition to Deny in TNZL File No. I-T-C-96-097, at 11 n.8.

³⁹ See TNZL File No. I-T-C-96-097 *ex parte* letter at 2 (filed Nov. 21, 1996). See also TNZL *ex parte* letter at 3 (filed Nov. 14, 1996) ("There are no restrictions whatsoever on the resale of . . . any . . . telecommunications services" in New Zealand).

⁴⁰ See *Monitoring Report*, CC Docket No. 87-339, Table 5.11 (May 1996) (noting that on average interstate access charges for originating (sum of columns A, C, and D) and terminating (sum of columns B, C, and D) traffic for the period July 1, 1996 - June 30, 1997 are in the 2-3 cents (U.S.) per minute range).

⁴¹ See TNZL File No. I-T-C-96-097, TNZL *ex parte* presentation (dated Oct. 10, 1996).

basis. According to TNZL, it is both technically and operationally feasible for an IPL reseller in New Zealand to provide international services using resold IPLs that are interconnected to the PSN via business lines. It may be necessary for IPL resellers that operate in this manner to deploy switching and other equipment in order to record their customers' usage and perform other functions.⁴² The lack of any restrictions on the use of business lines at standard rates by IPL resellers, also supports a finding that New Zealand satisfies the interconnection factor of our equivalency test.

23. We are concerned about the ability of similarly situated competing carriers to obtain interconnection on the same basis as TCNZ has provided Clear. We have made TNZL's and TCNZ's prompt provision of reasonable and nondiscriminatory interconnection for international carriers a specific condition of our facilities-based authorization to TNZL.⁴³ If market conditions develop in New Zealand such that interconnected IPL resale is not commercially viable, we will revisit our equivalency determination.

3. Competitive Safeguards

24. The third factor that we examine is whether competitive safeguards exist in the foreign country to protect against anticompetitive practices affecting interconnected private line resale. The safeguards we consider important include: (1) the existence of cost-allocation rules to prevent cross-subsidization; (2) timely and nondiscriminatory disclosure of technical information needed to use, or interconnect with, carriers' facilities; and (3) protection of carrier and customer proprietary information.⁴⁴

25. Neither CTS nor AT&T address the adequacy of the competitive safeguards that exist in New Zealand. We note, however, that the Ministry has submitted some information on this issue and that the issue is contested in TNZL's facilities-based application proceeding. Thus, we have referenced the Ministry's comments and restated our findings in the TNZL proceeding here.

26. Cross-Subsidization. Improper allocation of costs is of concern to the extent it could allow TNZL to recover costs from subscribers to its local exchange and exchange access services that were incurred by TNZL in providing international services. Such a practice can distort price signals in the New Zealand international services market and may give TNZL an unfair advantage over its competitors. New Zealand does not have specific cost allocation rules to address this concern. It relies instead on competition to restrain prices and on Section 36 of the Commerce Act 1986, which prohibits entities with a

⁴² See TNZL File No. I-T-C-96-097, *ex parte* letter (filed Dec. 17, 1996).

⁴³ See *Order, Authorization and Certificate*, *supra* note 1 at ¶ 23.

⁴⁴ *Foreign Carrier Entry Order* at ¶¶ 51, 136.

dominant position in a market from using their position to restrict or eliminate competition.⁴⁵ The Act prohibits exclusionary practices, price fixing, and resale price maintenance.⁴⁶ The Commerce Act 1986 also provides the Commerce Commission with the ability to initiate a price control inquiry or, if circumstances warrant, to impose price controls directly.⁴⁷ The Ministry considers TCNZ and TNZL to be dominant and therefore subject to these rules.⁴⁸

27. Although generally we believe cost allocation rules are important, we do not find the absence of such rules to preclude an equivalency finding in this case. First, the record suggests the Government has the ability and the apparent intent to monitor and enforce its pro-competitive policies. Second, the Government's "Kiwi Share" in TCNZ ensures that standard residential rates for phone line rentals do not increase faster than movements in the Consumer Price Index, unless the profits of TCNZ are unreasonably impaired.⁴⁹ This service pledge provides some protection against the potential for TCNZ improperly to shift international service costs to local customers. Third, with respect to potential misallocation of costs to TNZL's toll service competitors, who purchase exchange access, and in some cases, domestic toll services from TCNZ or TNZL, the record supports a finding that U.S. carriers today have the opportunity to obtain interconnection to TNZL's domestic facilities at reasonable rates. Finally, no party has argued that TNZL's private line rates are unreasonable. Facilities-based competition in the international and inter-city markets, and the absence of resale restrictions in New Zealand, should help ensure that rates for international private lines and inter-city services remain reasonable. While it has been our experience that cost allocation rules are a necessary safeguard for the development of an effectively competitive market in countries where one carrier is dominant, competition has developed in the context of New Zealand market conditions without such rules. We conclude on the basis of these findings that the absence of cost allocation rules does not preclude an equivalency finding for New Zealand. We note that we have made TCNZ's and TNZL's prompt provision of reasonable and nondiscriminatory interconnection for international carriers a specific condition of TNZL's facilities-based authorization. We also will revisit this equivalency finding if market conditions develop such that interconnected IPL resale is not commercially viable.

28. Disclosure of Network Information. The record suggests that carriers are receiving the technical network information necessary to interconnect with TNZL through their interconnection agreements. The publication of TCNZ's interconnection agreements provides at least some technical information needed to use or interconnect with TNZL's

⁴⁵ Ministry Letter at 2.

⁴⁶ CTS Application at Exhibit A, New Zealand Regulatory Environment for Telecommunications at 2-3.

⁴⁷ See Media Release at 2, *supra* note 34.

⁴⁸ Ministry Letter at 1-2.

⁴⁹ See *infra* note 66.

facilities.⁵⁰ Furthermore, no party has offered specific evidence that any carrier has been denied the technical information needed to operate a telecommunications network service in New Zealand. The record indicates that withholding essential technical information by TCNZ or TNZL also is actionable under the Commerce Act as anticompetitive conduct.

29. CPNI Safeguards. With regard to carrier and customer proprietary information, there is no information in the record suggesting that TNZL cannot use the customer proprietary network information ("CPNI") of TNZL's local service customers to market international services.⁵¹ However, it appears that TCNZ and TNZL have affirmative obligations under New Zealand law and individual interconnection agreements to protect carrier and customer proprietary information.⁵² While the adequacy of the safeguards protecting proprietary information in the New Zealand market is not contested in this proceeding, the Ministry has informed us that New Zealand carriers are currently finalizing a privacy code that will, among other things, protect customer information held by one entity from being sold to another entity for marketing purposes without the customer's permission.⁵³ Our expectation is that specific safeguards in this area will be developed, as necessary, initially by the carriers themselves. We also find no basis to question TNZL's claim, in connection with its facilities-based application, that TCNZ's interconnection agreements safeguard proprietary information.

30. In sum, given the extent of competition in the New Zealand facilities-based market and the availability of favorable interconnection rates, New Zealand's general competition laws and regulations appear to be providing sufficient protection against anticompetitive practices, including cross-subsidization and the unauthorized disclosure of proprietary information. Also, New Zealand regulatory institutions have sufficient authority to intervene (as explained in the next section) to protect competition. Further, the record

⁵⁰ See TNZL File No. I-T-C-96-097, TNZL Opposition at 15. We note that Clear has achieved a significant share of New Zealand's international and domestic toll markets, which suggests that Clear has obtained sufficient information to interconnect.

⁵¹ The Commission currently is considering the extent to which new Section 222 of the Act permits a telecommunications carrier in the United States to use CPNI received by virtue of its provision of a telecommunications service. See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, *Notice of Proposed Rulemaking*, CC Docket No. 96-115, 11 FCC Rcd 12513 (1996). The Commission's rules do not at this time specify particular CPNI requirements for local exchange carriers ("LECs") other than the Bell Operating Companies ("BOCs") and the General Telephone Operating Companies (GTE). The new Section 222 requirements regarding telecommunications carriers' use of CPNI apply to, among other telecommunications carriers, all LECs including the BOCs and GTE. The BOCs are prohibited from providing "in-region" interstate, interLATA services except upon a Commission finding that they have met the requirements of new Section 271 of the Act.

⁵² See TNZL File No. I-T-C- 96-097, Opposition at 15. See also Ministry Letter at 8.

⁵³ Ministry Letter at 9.

suggests that TCNZ provides carriers with the technical information necessary to interconnect, and that its interconnection agreements protect against the unauthorized disclosure of proprietary information. The number of international operators that have entered into interconnection agreements with TCNZ and that are operating in New Zealand today suggests that the New Zealand regulatory environment, including its competitive safeguards, is conducive to competitive entry by U.S. carriers.

4. Regulatory Framework

31. The fourth factor of the equivalency analysis is whether there is an effective regulatory framework in the destination country to develop, implement and enforce legal requirements, interconnection arrangements and other competitive safeguards.⁵⁴ Our focus is whether there is sufficient separation between the regulator and the operator of international facilities-based services, and whether there are fair and transparent regulatory procedures in New Zealand.

32. AT&T contends that the absence of a regulator empowered to resolve disputes prevents New Zealand from being an equivalent country. According to AT&T, the lack of a regulator has stymied competition in New Zealand and has been a principal factor in the four year interconnection dispute between TCNZ and Clear. AT&T also cites to an article which states that TCNZ has become the *de facto* regulator simply because of its overall market dominance and ownership of the major part of the country's telecommunications network infrastructure.⁵⁵

33. CTS claims that the competitiveness of the New Zealand market should be judged by results, not organizational structure. According to CTS, New Zealand's approach of non-intrusive government regulation and promotion of competition is consistent with the current deregulatory trend in the United States. CTS states that New Zealand's highest level of government promotes competition. CTS points to efforts by the Prime Minister and the Minister of Communications to settle the TCNZ-Clear dispute, although CTS asserts the dispute is irrelevant because it relates to local exchange service.⁵⁶

34. AT&T acknowledges that TCNZ and Clear have settled their dispute, and that the dispute centered on access for the provision of local exchange service. It contends, however, that the delay attests to the problems that occur when a new entrant must rely on the good will of its primary competitor -- who has a vested interest in delaying competitive entry -- and protracted court appeals as a surrogate for an independent, impartial and

⁵⁴ *Foreign Carrier Entry Order* at ¶¶ 54, 136.

⁵⁵ AT&T Petition to Deny at 2, 6, 8, 9.

⁵⁶ CTS Application at 8-9, 8 n.16; CTS Opposition to Petition to Deny at 6-8.

engaged regulator.⁵⁷ AT&T claims that the TCNZ-Clear agreement was reached only when the government was ready to abandon the "light-handed approach" and instead, threatened direct regulatory intervention.⁵⁸

35. Although we have concerns about the effectiveness of the New Zealand regulatory regime, we nevertheless conclude that on balance there is sufficient regulatory oversight to protect and promote competition in the New Zealand telecommunications market. As an initial matter, we note that the Commission's equivalency test does not require a regulatory regime exactly patterned on that which exists in the United States. While New Zealand does not have an industry-specific regulator for telecommunications, three institutions oversee the industry: the Commerce Commission, the Ministry of Commerce, and the courts. The Commerce Commission, an independent statutory body, is responsible for the public enforcement of the Commerce Act 1986 (as amended by the Commerce Amendment Act 1990).⁵⁹ The Commerce Act is the general law of competition in New Zealand and is the primary statutory instrument to establish conditions of effective competition in the telecommunications sector.⁶⁰ The Commerce Commission investigates possible breaches of the Act, takes legal action as appropriate, and makes recommendations to the Government on competition and price control issues.⁶¹ The Communications Division of the Ministry administers the Telecommunications Act and various regulations,⁶² as well as provides policy advice to the New Zealand Government.⁶³ Finally, the court system adjudicates disputes dealing with anticompetitive behavior.⁶⁴

⁵⁷ AT&T Reply to Opposition at 2 & n.2.

⁵⁸ *Id.* at 4.

⁵⁹ Ministry Letter at 3.

⁶⁰ *Id.* See *supra* ¶17. See also New Zealand Regulatory Environment for Telecommunications at 2-3. New Zealand chose not to establish a regulatory body with enforcement power over the telecommunications industry, as it considered that general competition law can control the specific competition issues which might arise. Honorable Maurice Williamson, Minister of Communications on Recent Developments in New Zealand Communications Industries (1994).

⁶¹ Ministry Letter at 3.

⁶² Despite New Zealand's reliance on general competition law, it has passed some industry-specific laws and regulations. See *supra* ¶ 17.

⁶³ CTS Application at 4-5. The Communications Division is headed by a Minister of Communications, who reports directly to Parliament. Memorandum from Graeme Quigley & Bridget Fahy to Robert Conn, appended to Letter from Robert Conn, Attorney for CTS, to Scott B. Harris, Chief, International Bureau (Dec. 11, 1993).

⁶⁴ The final recourse for the resolution of disputes is through the court system under Section 36 of the Commerce Act 1986. In June 1996, the Government reviewed its regulatory environment and decided to continue with the present regulatory regime based on the Commerce Act. The Government also

36. We recognize that reliance on private negotiations and the courts may be problematic, as the courts may not have the expertise to make accurate, predictable, efficient declarations consistently. However, parties may request intervention from the Ministry and from the Commerce Commission before going to the courts. Further, the New Zealand government has demonstrated its willingness to intervene in disputes between competing carriers.⁶⁵ Thus, there are alternative complaint procedures. While we believe competition would be better assured if the Ministry took a more active regulatory approach, we conclude there is adequate regulatory oversight in New Zealand, particularly when considered in combination with the expanding list of competitors and their ability to capture market share in the New Zealand international telecommunications market.

37. Further, we note that the New Zealand regulatory regime is legally distinct from TCNZ and TNZL, and the record indicates that it operates impartially. In this regard, the Kiwi Share -- the New Zealand government's specialized interest in TCNZ -- does not present concerns to us regarding the government's independence. The Kiwi Share grants the government special voting rights to control the maximum shareholding of any single foreign party in TCNZ, and to ensure TCNZ's compliance with certain residential service pledges.⁶⁶ The New Zealand government does not receive the financial benefits normally accruing to equity ownership as a result of the Kiwi Share, nor does TCNZ possess any special influence in relation to New Zealand regulatory and policy matters due to the Kiwi Share. Finally, as detailed previously, the record indicates that sufficient regulatory transparency exists in New Zealand to allow competitors to know what mechanisms exist to redress perceived violations of the law by TCNZ or TNZL.⁶⁷

38. In summary, we find that New Zealand offers equivalent opportunities to U.S.-based carriers to resell IPLs for the provision of switched services. If in the future we are presented with evidence that legal or regulatory conditions in New Zealand are frustrating the commercial viability of resale by U.S.-based carriers in that country, we will review this

stated that officials will continue to monitor developments closely and continue to evaluate any potential means of improving on the present regime. See Media Release *supra* note 34.

⁶⁵ See *supra* note 34.

⁶⁶ CTS Application at 6 (*citing* New Zealand Regulatory Environment for Telecommunications at 6); Aff. of Geoffrey Richard McCormick at ¶ 4, in Letter from Robert E. Conn, Attorney for CTS, to Scott B. Harris, Chief, International Bureau (Jan. 11, 1996). The residential service pledges require that: (1) local free calling remain a tariff option to residential customers; (2) standard residential rental for a phone line may not increase faster than movements in the Consumer Price Index unless the profit of TCNZ is unreasonably impaired; and (3) phone line rentals for residential customers in rural areas may not be higher than in the cities, and the residential service must remain as widely available as it is at present. New Zealand Regulatory Environment for Telecommunications at 5-6; Ministry Letter at 13. See also *supra* note 25, ¶ 27.

⁶⁷ See *supra* ¶¶ 17-18, 28-29, & 35-36.

equivalency finding. Thus, our finding is subject to New Zealand continuing to offer equivalent resale opportunities to U.S.-based carriers.

B. Additional Public Interest Factors

39. The additional public interest factors that we consider in assessing CTS's application include the general significance of the proposed entry to the promotion of competition in the U.S. communications market and any national security, law enforcement, foreign policy, and trade concerns raised by the Executive Branch.⁶⁸

40. The Executive Branch has not raised any national security, law enforcement, foreign policy, or trade concerns with this application. We believe that this authorization will benefit U.S. consumers calling New Zealand by increasing competition to that country. Moreover, it will put additional pressure on New Zealand collection rates, thereby stimulating inbound U.S. traffic from this country, and ultimately put additional pressure on New Zealand accounting rates. We accordingly find it in the public interest to permit CTS to enter the IPL resale market for the provision of switched services on the U.S.-New Zealand route.

C. Other Matters

41. By adding New Zealand to the Commission's list of equivalent countries, authorized U.S. private line resellers may now carry U.S. inbound or outbound switched traffic via private lines extending between the United States, the United Kingdom, Sweden and New Zealand.⁶⁹ Pursuant to Section 63.17 of the rules, our equivalency finding also permits authorized U.S. carriers to engage in "switched hubbing" through New Zealand in

⁶⁸ *Foreign Carrier Entry Order* at ¶¶ 62, 66.

⁶⁹ *See Cable & Wireless, Inc., et al.*, 11 FCC Rcd 1766 at ¶ 36 ("We reiterate here the Commission's general view that the international resale policy is not undermined by the routing of switched traffic via end-to-end private lines extending from the United States through one equivalent country to a third equivalent country.") and at ¶ 36 n.64 (noting that the Commission has made an exception to this approach in the case of Canada because of Canada's unique routing restrictions). We note that our rules automatically expand the Section 214 authority of carriers authorized to resell interconnected private lines to include all countries at the time they are designated equivalent. This rule is subject to one exception: if the carrier is affiliated with a facilities-based foreign carrier in the equivalent country, we must have already made a determination that the affiliated foreign carrier does not possess market power in that country before the carrier can resell interconnected private lines to its affiliated, equivalent country. *See Streamlining the International Section 214 Authorization Process and Tariff Requirements, Report and Order*, 11 FCC Rcd 12884 (1996). The rules also permit an authorized U.S. facilities-based IPL carrier to use private lines to provide switched basic services to equivalent countries except in circumstances where the applicant is affiliated with a facilities-based carrier in the country at the foreign end of the private line, and the Commission has not determined that the foreign carrier does not possess market power in that market. 47 C.F.R. § 63.18(e)(4).

accordance with the provisions of that rule.⁷⁰

42. In order to assist us in monitoring for unanticipated consequences of our action here, for the first three years following our equivalency finding, we require that CTS and any other non-dominant IPL resellers providing switched or interconnected IPL services between the United States and New Zealand file with the Commission semi-annual traffic reports for that route. This report should be in the same form as the annual reporting of "facilities resale" in the annual traffic reports specified in Section 43.61.⁷¹ The Commission has previously imposed this requirement to provide a timely means of ensuring that its international resale policy is having its intended effect.⁷² Each such reseller shall file a semi-annual traffic report with the Commission not later than September 30, for the prior January through June period (starting with the January through June 1997 reporting period) and not later than March 31 for the second six-month calendar period. After three years, the carriers will file annual traffic reports pursuant to Section 43.61 of the Commission's Rules.⁷³ The current traffic manual specifically requires that carriers engaged in "facilities resale," i.e., private line resellers, report U.S. outbound and inbound traffic originating or terminating over resold U.S. private lines. Private line resellers are required to report their outbound and inbound traffic according to the ultimate point of termination or origination.

43. We find this reporting requirement sufficient to address AT&T's allegation that private line resellers could only provide one-way international resale into the United States.⁷⁴ We recognize that these additional traffic reports may not detect subtle shifts in traffic patterns (or unauthorized bypass of the settlements process). They will assist our efforts, however, to monitor whether our international resale policy is resulting exclusively in one-way resale into the United States.

44. As a final matter, we conclude that CTS merits regulation as a non-dominant carrier on the U.S. - New Zealand route for the services authorized in this order.⁷⁵ CTS states that it is affiliated with WorldxChange, a registered international operator in New

⁷⁰ 47 C.F.R. § 63.17. See also *Foreign Carrier Entry Order* at ¶¶ 169-70.

⁷¹ See 47 C.F.R. § 43.61 (1994).

⁷² See *ACC Global/Alanna Order*, 9 FCC Rcd 6240 at ¶ 51; *fONOROLA Reconsideration Order*, 9 FCC Rcd 4066 at ¶ 20; *Cable & Wireless Inc., et al.*, 11 FCC Rcd 1766 at ¶¶ 34, 35.

⁷³ 47 C.F.R. § 43.61 (1994).

⁷⁴ AT&T Petition to Deny at 7.

⁷⁵ See Section 63.10(a) of the rules, 47 C.F.R. § 63.10(a) (regulatory classification of U.S. international carriers with foreign carrier affiliates).

Zealand.⁷⁶ We find no evidence in the record, or the TNZL facilities-based proceeding, however, that suggests WorldxChange, a new competitor in New Zealand, has the ability to discriminate in favor of CTS.

IV. CONCLUSION

45. We grant CTS's application because we find that New Zealand offers equivalent private line resale opportunities to U.S.-based carriers for the provision of switched services. We believe that the interconnected IPL service between the United States and New Zealand will promote the introduction of new international telecommunications services at lower prices, including more cost-based accounting rates. It also will promote new entry into the international telecommunications market and advance the goal of achieving a competitive global information infrastructure.

V. ORDERING CLAUSES

46. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of resale of international private lines for the provision of switched services between the United States and New Zealand.

47. Accordingly, IT IS HEREBY ORDERED that application File No. I-T-C-95-444 IS GRANTED, and applicant is authorized to resell international private lines for the provision of switched services between the United States and New Zealand including voice, data, and facsimile.

48. IT IS FURTHER ORDERED that the authority granted herein to resell international private lines for the provision of switched services between the United States and New Zealand is limited to the provision of such services between the United States and New Zealand only - - that is, private lines which carry traffic that originates in the United States, and terminates in New Zealand, or traffic that originates in New Zealand and terminates in the United States. This restriction is subject to the following exceptions: (a) applicant may engage in "switched hubbing" through New Zealand consistent with the rules adopted in the *Foreign Carrier Entry Order*, 11 FCC Rcd 3873 at paras. 169-70 (1995); and (b) applicant may provide U.S. inbound or outbound switched basic service over its authorized private lines extending between the United States and the United Kingdom, Sweden and New Zealand provided the applicant also is authorized to provide switched basic service using resold private lines between the United States and these countries.

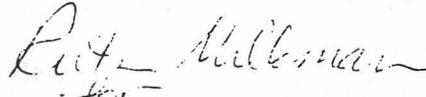
⁷⁶ See *supra* note 3.

49. IT IS FURTHER ORDERED that applicant shall comply with Sections 63.21 and 63.15(b) of the rules, except that applicant shall also file the information required by Section 43.61 for "facilities resale" on the U.S.-New Zealand route on a semi-annual basis, not later than September 30 for the prior January through June period and March 31 for the second six-month calendar period, for the first three calendar years after this equivalency finding.

50. IT IS FURTHER ORDERED that grant of this authorization is conditioned upon New Zealand's continuing to afford resale opportunities to U.S.-based carriers equivalent to those afforded under U.S. law.

51. This Order is issued under Section 0.261 of the Commission's Rules, 47 C.F.R. § 0.261 (1994), and is effective upon adoption. Petitions for reconsideration under Section 1.106, 47 C.F.R. § 1.106 (1994), or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115 (1994), may be filed within thirty days of the Public Notice of this Memorandum Opinion, Order and Certificate (*see* 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION



Donald H. Gips
Chief, International Bureau